

OCA 2402-89

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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OCA 2402-89

July 21, 1989

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LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer -

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| National Security Council (Lampley x3055) | |
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SUBJECT: Justice draft testimony regarding the foreign policy implications of biological weapons proliferation. A hearing is scheduled for July 26th before the Senate Judiciary Committee.

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

A response to this request for your views is needed no later than C.O.B., MONDAY, JULY 24, 1989.

Questions should be referred to SUE THAU/ANNETTE ROONEY (395-7300), the legislative analyst in this office or to JEFF ASHFORD (395-3920).

RONALD K. PETERSON FOR
Assistant Director for
Legislative Reference

Enclosure

cc: C. Boyden Gray T. Thiele
D. Taft S. Dotson

(SUBSTITUTE FOR THE FIRST TWO PARAGRAPHS OF THE DRAFT)

Thank you for inviting me to appear here today on behalf of the Department of Justice to discuss S. 993, the Biological Weapons Anti-Terrorism Act of 1989.

The Department of Justice supports the thrust of this legislation. Although fortunately this country has apparently not experienced the deliberate use on United States soil of biological toxins and weapons as a means of terrorist attack, the potential for such use is clearly present and poses a danger that should be promptly addressed. One necessary step in enhancing this nation's ability to deter and punish such behavior is the enactment of strong laws to regulate the development, production, and stockpiling of these extremely hazardous materials. We believe that S. 993 represents a sound approach to regulating biological weapons, without jeopardizing legitimate research, and that, with the relatively minor modifications I shall suggest below, it would be an effective new tool that would fill a gap in our current statutory arsenal against potential terrorist activities.

Thank you for inviting me to appear here today on behalf of the Department of Justice to discuss S. 993, the Biological Weapons Anti-Terrorism Act of 1989.

We have a number of changes which we would propose making to S. 993. Before discussing some of these proposed changes, however, we would like to express our general approval of the bill's approach to regulating these extremely dangerous materials.

Introduction

Under Article IV of the international Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and their Destruction, each signatory state has an obligation to take necessary steps to comply with the Convention within its respective jurisdiction. Although there is some debate as to whether legislation implementing the Convention is still required, it is plain that this bill would fulfill any remaining obligation of the United States to enact such legislation. We also believe that the bill would be a useful law enforcement measure because it would enable the Department of Justice to prosecute individuals who possess dangerous

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biological materials for no legitimate purpose, without having to wait for the materials to be misused.

Turning now to our proposed revisions:

Extraterritorial Applicability

The opening clause of section 175 appears to be an effort to give the bill extraterritorial applicability. To make it more consistent with other portions of Title 18 which have extraterritorial application (e.g., 18 U.S.C. §§ 7(7) and 1512(g)), we suggest omitting the phrase "in the United States or under the jurisdiction or control of the Government of the United States anywhere" and adding a new sentence at the end of section 175 after the penalties: "There is extraterritorial Federal jurisdiction over an offense under this section committed by or against a national of the United States."

Biological vs. Chemical Agents

In paragraphs (1) and (2) of section 175 (and in paragraphs (a)(1) and (2) of section 176, and in paragraph (a)(3) of section 177), we would insert "biological" before "agent." Although the title of the bill and the definitions imply that the bill controls biological as opposed to chemical agents, this needs to be made explicit within the operative language.

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Defining International Organizations

Also with respect to section 175, we suggest that all of current paragraph (2) be deleted in favor of placing at the end of paragraph (1) the phrase, "or knowingly assists any person or organization to do so." We believe that giving the section extraterritorial application and forbidding assistance to any person or organization would adequately cover international offenses. If Congress wishes to emphasize that it is addressing international violations here, we suggest that consideration be given to redefining, in this bill, the term "international organization." It is now defined in paragraph (2) by reference to 18 U.S.C. § 1116, which in turn incorporates 22 U.S.C. § 288. These two sections refer to recognized public organizations created pursuant to treaty or special governmental designation. Defining "international organization" by reference to these two sections thus has the effect of limiting the term to official, government-sanctioned organizations and omitting international terrorist groups. We believe that it would be preferable to define the term to include terrorist organizations.

Unexplained Possession of Biological Weapons

Finally, with respect to section 175, we would suggest adding a new paragraph (2) which would provide that whoever

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"produces, stockpiles, transfers, acquires, retains, or possesses any biological agent, toxin, or delivery system, knowing or having reason to know that it is primarily useful as a weapon of mass destruction;"

would be guilty of an offense. Paragraph (1) would thus cover the case in which materials with a legitimate purpose were being held with the intent to use them for an improper purpose. New paragraph (2) would allow the government to charge a defendant who is in unexplained possession of biological weapons without having to show how he intended to use them. New section 178 provides a statutory defense to paragraph (2), as explained below.

Forfeiture

Section 176 authorizes forfeiture of biological weapons. We suggest that the "and" which separates the paragraphs should be changed to "or." Conduct under either paragraph should be sufficient to justify a forfeiture.

Consolidating the Defense Provisions; Creating a Defense to Unexplained Possession

Part (b) of section 176 outlines a defense to forfeiture proceedings. We suggest consolidating the defense provisions of Section 176 and Section 177 and adding them to a new section 178. We also think the defense should apply to new paragraph

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(2) of section 175. We do not believe that there could or should be a defense to knowing conduct with biological weapons which are intended for use as weapons of mass destruction.

Speech Not Actionable

Section 177 authorizes injunctive proceedings. It appears that, under paragraphs (2) and (3) of Part (a), an injunction could be sought for "planning" to engage in prohibited conduct. We suggest that this term be stricken to make clear that mere speech is not actionable. Also, we suggest that the defense outlined in Part (b) be moved to a new section 178.

Definitions

Current section 178 contains the bill's definitions. It should be renumbered if our suggestion on placing the defense portions of the bill in a new section 178 is adopted.

Violations by Agencies of the Government

Current section 178(6) (which should probably be 178(a)(6)), explicitly states that the bill's provisions cover actions by "governmental entities and personnel." Although the language of the bill is somewhat different from that of the Convention, we assume that the bill's intent is to go no further than the requirements of the Convention. A difficulty with specifically including governmental entities and personnel

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within this bill is that, in light of §§ 176 and 177, the bill permits the United States to sue itself if there is a violation by an agency of the federal government. This provision thus may violate the presumption that the sovereign cannot sue itself.

Defense Portion

As we noted earlier, we think it would be preferable to move the defense portions of sections 176 and 177 to the end of the bill. This would create a new section 178. We also suggest that the defense the bill provides to injunctive and forfeiture proceedings apply to criminal actions under paragraph (2) section 175 as well if our suggested modifications to section 175 are adopted. This would have the effect of lowering the government's burden of proof in its case-in-chief under new paragraph (2), requiring only that it show the defendant possessed material primarily useful as a weapon of mass destruction, while providing the defendant with a statutory defense in an appropriate case, i.e., when his possession of the material was proper under all the circumstances. We think that this approach is more likely to yield straightforward cases and just results.

This concludes my statement. I will be glad to address any questions the Committee may have.